SUPREME COURT, U. S.

JUL 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1963

FREDERICK F. PORDUM,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, the Commissioner of Education of the State of New York, and the CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Board of Regents of the State of New York and Ewald B. Nyquist, the Commissioner of Education of the State of New York, and the City School District of the City of Lackawanna,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Frederick F. Pordum prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 491 F. 2d 1281 (1974). It is reprinted in Appendix "A" *infra*. The opinion of the United States District Court, Northern District of New York, is reported at 357 F. Supp. 222 (1973); it is reprinted in Appendix "B," *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 20, 1974, and a timely petition for rehearing was denied on April 4, 1974, Appendix "C," *infra*. This court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented.

1. Did the United States Court of Appeals for the Second Circuit err in affirming the dismissal of the instant action for lack of jurisdiction on the basis of failure to raise a substantial constitutional claim within the meaning of this Court's decision in *Goosby vs. Osser*, 409 U. S. 512, 518 (1973)?

2. Even if petitioner's claim did not entitle him to the convening of a three-judge court, did his complaint, which alleged a denial of due process and equal protection by reason of the failure of respondents to accord him any type of pre-suspension hearing, state a cause of action which could not be summarily dismissed by the lower courts?

Constitutional and Statutory Provisions Involved.

This case involves New York State *Education Law* §305(7), 28 U.S.C. §§ 2281 and 1343(3), 42 U.S.C. §1983, and the First and Fourteenth Amendments to the United States Constitution. These and all other relevant statutes are reprinted in Appendix "D" *infra*.

Statement of the Case.

A. Background.

Petitioner Frederick F. Pordum is a tenured teacher in the Lackawanna, New York, school system. He holds a New York State teaching certificate issued by the Commissioner of Education of New York State. In 1967, Pordum requested and received a two-year leave of absence from the respondent school district, and this leave was subsequently extended for an additional three years, to expire on January 1, 1973. In June of 1971, while Pordum was a member of the Erie County Legislature, he was convicted in the United States District Court, Western District of New York, of the crime of conspiracy to promote and facilitate the promotion of bribery of public officials, a felony under 18 U.S.C. §371. He was sentenced to serve three years in prison.

On December 22, 1972, Pordum was released on parole from prison. He wrote to the Lackawanna school system on December 29, stating that his leave of absence was about to expire and that he was ready to resume teaching. By letter dated January 24, 1973, the school district informed petitioner Pordum that it had assigned him to Wilson Elementary School, effective February 1, 1973, as a classroom teacher.

On January 24, 1973, the Commissioner of Education wrote to Pordum, ordering him to show cause on February 15, 1973, at a hearing why his teaching certificate should not be revoked. The Commissioner stated in the letter that he was acting pursuant to New York *Education Law* §305(7), which provides:

> "He [the Commissioner] may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such manner."

In a separate order dated January 24, the Commissioner ordered the Lackawanna School District not to re-employ Pordum pending the outcome of the February 15 hearing. On January 30, 1973, respondent school district informed Pordum that he would be notified by the district or by the Commissioner if and when he was to report to work.

Pordum declined to submit to the *ad hoc* hearing ordered by the Commissioner. At his request, the hearing was postponed until March 30, 1973. On March 8, he commenced this action in the United States District Court, naming the Board of Regents, the Commissioner and the City School District of the City of Lackawanna as defendants and challenging the constitutionality of New York *Education Law* §305(7). The Commissioner remains prepared to go forward with the hearing, which petitioner Pordum contests as unconstitutional. The school district, meanwhile, asserts that it is ready and willing to employ Pordum, without a hearing. Although a defendant in this lawsuit, the school district joined in petitioner's motion before the District Court for immediate reinstatement. The school district did appear at oral argument before the District Court but not before the Court of Appeals.

Petitioner Pordum contends that section 305(7) is unconstitutional in that it does not afford due process of law, is fatally vague, violates the equal protection clause,

and is overboard in the absence of regulations defining the grounds for revocation of a teaching certificate or any procedure to be followed in doing so.

B. Proceedings in the District Court, Northern District of New York.

The action was commenced on March 8, 1973, by the filing of a complaint. Summonses were served on March 15, 1973, on respondents Board of Regents, Ewald B. Nyquist, and the City School District of the City of Lackawanna.

The complaint, basing federal jurisdiction on 28 U.S.C. §§1343(3), 2281, 2284, and 42 U.S.C. §1983, alleged a deprivation of liberty and property under color of state law. In addition, petitioner Pordum's complaint alleged a potential chilling effect on protected rights under the First Amendment to the United States Constitution and a denial of equal protection of law under the Fourteenth Amendment.

Petitioner requested pursuant to 28 U.S.C. §§2281 and 2284, the convening of a three-judge federal district court to hear and determine the proceedings, a temporary, preliminary and a permanent injunction, a declaration of the unconstitutionality of section 305(7) of the *Education Law* of the State of New York, and for restitution of lost earnings, costs and attorneys' fees.

Chief Judge Foley found:

> "There is, in my judgment, sufficient precedent in the decisions of the United States Supreme Court and the New York Court of Appeals to foreclose the vagueness claim as it relates to the con-

vention of a three-judge court" [357 F. Supp. 222 (1973) at page 225].

Judge Foley, in ruling upon petitioner Pordum's claim of violation of due process, stated at page 225:

> "Thus the plaintiff it seems plain has been accorded the full range of due process rights which have been granted, in my judgment, not in an attempt to evade review of the challenged statute, but with an attitude of fairness to insure compliance with due process requirements. Therefore, I find §305(7) has not been applied in an unconstitutional manner in regard to due process notice and hearing rights. Furthermore, in light of the court rulings dealing with tenure of teachers (e.g.), *Slochower v. Board of Education*, 350 U. S. 551), state granted licenses (*Bell v. Burson, supra*), and the present statutory scheme providing for hearing procedures in the discharge of tenured teachers (Education Law §2573(5) (McKinney's Supp. 1972); Education Law §3020-a (McKinney's 1970), it would seem incongruous to assume the Commissioner would apply §305(7) in the future without affording a party the various due process protections specifically accorded in this situation. In addition, *the state courts have held a tenured teacher who does not possess a certificate cannot be discharged without being offered the proper hearing procedures and that lack of certificate only bears only upon the issue of incompetency as set forth in Education Law §2573(5) (supra).* (*Matter of Majnix v. the Board of Educ.* 21 N. Y. 455, 460, 288 N. Y. S. 2d 881, 235 N. E. 2d 892; *Matter of Kobylski v. Agone*, 37 Misc. 255, 263, 234 N. Y. S. 2d 907.)" (Italics supplied.)[1]

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[1]The District Court's view of the requirements of Education Law §3020-a is more correct conceptually than that of the Second Circuit reliance on that section; however, to support the Commissioner's action is totally misplaced in the light of the statutory scheme (see Commissioner's Decision No. 8822

In regard to petitioner Pordum's argument of vagueness, Chief Judge Foley noted:

> "Again the argument is foreclosed by previous rulings of the United States Supreme Court. It is settled that a court should never 'anticipate a question of constitutional law in advance of the necessity of deciding it'" [at page 226].

Judge Foley summarily dismissed Pordum's equal protection argument, stating at page 226:

> "The last allegation, also contained in paragraph 20 of the complaint and apparently levied as a parting shot at the challenged section, is in my view obviously without merit. The bare allegation is made that there is a violation of the Equal Protection Clause in that other professions are treated differently and is totally conclusory in nature and unsupported by any factual allegations * * * The standard of conduct for a teacher is not unlike the standards familiarly required in the other professions and the judiciary within the State of New York, and such an unsupported allegation by bare statement will not create a substantial federal question such as to necessitate the convening of a three-judge court."

Finally Judge Foley added:

> "In my judgment, the allegations in the complaint on their face do not raise questions of sufficient federal constitutional substance to warrant

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(footnote continued)

[Colen Gardner] which is attached as Appendix "E" and which explains said scheme). For the questionable constitutionality of section 3020, see *Kinsella vs. Board of Education, et al.*, F. Supp. (W.D.N.Y. 1974), attached herewith as Appendix "F," a three-judge court decision which is now final in light of the State of New York's failure to appeal.

> the convention of the statutory three-judge court pursuant to the jurisdictional authorization of 28 U.S.C. §2281 * * * There remains the jurisdictional allegation of 28 U.S.C. §1343(3) under which there is the requirement to state a substantial constitional claim * * * The findings outlined here in that the allegations and the complaint are insubstantial for purposes of 28 U.S.C. §2281 likewise require the dismissal of the complaint as it alleges jurisdiction under 28 U.S.C. §1343(3), and the reliance on 42 U.S.C. §1983" [at page 226].

The lower court then dismissed the motions of petitioner requesting the convening of a three-judge court and denied the granting of a temporary restraining order and preliminary injunction, while dismissing the complaint for lack of jurisdiction.[2]

C. Proceedings in the United States Court of Appeals for the Second Circuit.

The United States Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Northern District of New York. The court first noted that the lower court was correct in finding that petitioner Pordum's claim in the instant case was foreclosed by previous decisions of the Supreme Court as obviously lacking in merit and therefore not requiring the convening of a three-judge panel. *Goosby v. Osser,* 409 U. S. 512, 518 (1973).

The Second Circuit determined that petitioner Pordum's due process rights to liberty and property were not denied, because the Commissioner of Education noti-

[2]Although brought to its attention during oral argument and by petitioner's briefs, the District Court did not consider this Court's decision in *Goosby vs. Osser, supra.*

fied petitioner that a hearing would be held prior to the Commissioner's ultimate disposition on the continuation of his teaching certificate; that a hearing officer would preside; that petitioner would be allowed to present evidence, cross examine witnesses and obtain a copy of the transcript of the hearing. Although no written procedures regarding this kind of hearing were in evidence, the District Court and the Second Circuit both found that the Commissioner's determination was reviewable pursuant to the New York *Civil Practice Law and Rules*, Article 78.[3] The Second Circuit, agreeing with the lower court, determined that petitioner was not entitled to a hearing prior to his suspension without pay. It noted that governmental interests have been held sufficient to outweigh the indivdual's interest in a prior hearing.

The Court of Appeals found:

> "Appellant's vagueness claim must fail because Pordum cannot argue that he was surprised to learn that a felony conviction might bar him from teaching in the public schools in New York State" [at page 1285].

The court noted that a teacher is fairly chargeable with the knowledge that conduct which will subject him or her to five years in prison will also subject that teacher to review concerning fitness to teach.

The Court of Appeals determined that petitioner Pordum's equal protection argument must fail because even though the New York *Education Law* provided different

[3]A conclusion also of questionable constitutionality in light of the three-judge court decision in *Kinsella, supra*, and the Second Circuit's own decision in *James vs. Board of Education*, 461 F. 2d 566 (2d Cir. 1972).

standards in regulating other professions, the distinctions are justified by reason of legislative determination that different treatment with respect to the disciplining of the different professions is required. *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955).

The Court of Appeals agreed with the District Court in holding that petitioner Pordum's argument that New York State *Education Law* §305 (7) is overbroad, and thereby created an impermissible chilling effect on First Amendment rights, lacked substantiality. The Second Circuit also noted, in agreeing with the lower court:

> "* * * Judge Foley 'did not need to call on two other judges for reassurance, *Green v. Board of Elections*, 380 F. 2d 445, 452 (2d Cir. 1967), cert. denied, 389 U. S. 1048 (1968); *Nieves v. Oswald*, 477 F. 2d 1109, 1115 (2d Cir. 1973)" (at page 1286).

Finally the Court of Appeals determined:

> "Since it is clear that appellant's constitutional rights have not been violated, dismissal was proper" [at page 1287].[4]

[4]The court then added a long footnote noting this Court's rejection of irrebuttable presumptions as being disfavored under the due process clause and other factors which make, it is submitted, its affirmance of the District Court questionable.

REASONS FOR GRANTING THE WRIT.

I.

The courts below were in error in dismissing petitioner's complaint for lack of a substantial constitutional question.

When a claim is filed requesting interlocutory or permanent injunctive relief pursuant to 28 U. S. C. §2281, the judge before whom the claim is filed is required to convene a three-judge federal court by following the procedures outlined in 28 U. S. C. §2284. The district court is very limited with respect to its power to review the claim presented. In *Idlewild Bon Voyage Liquor Corporation v. Epstein, et al.*, 370 U. S. 713, 715 (1962), this Court held:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The district court judge is not required to convene a three-judge federal court when it is *clear* that no substantial federal question is presented. The most recent explication of what constitutes an insubstantial federal question is found in *Goosby v. Osser*, 409 U. S. 512, 518 (1973), wherein this Court stated:

> "'Constitutional insubstantiality' * * * has been equated with such concepts as 'essentially fictitious' * * * 'wholly insubstantial' * * * 'obviously frivolous' * * * 'obviously without merit' * * *. *A*

> *claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'"* (Italics added.)

Thus, the two tests for determining whether a substantial federal question is lacking are whether the claim is obviously without merit and whether previous decisions of the Supreme Court have foreclosed the subject. *California Water Service Co. v. City of Redding,* 304 U. S. 252, 255 (1938). *Nieves, et al. v. Oswald,* 477 F. 2d 1109 (2d Cir. 1973).

That the questions raised herein by the merits were not insubstantial is reflected by the fact that, during the pendency of this matter in both the District Court and the Second Circuit, this Court had pending before it *Arnett v. Kennedy,* U. S. , 42 L. W. 4513 (1974); *Snead v. Dept. of Social Services,* 355 F. Supp. 764 (S. D. N. Y. 1973), judgment vacated U. S. (1974), 42 L. W. 3626; *Sanford v. Wilson* and *Collins v. Wilson,* 32 N. Y. 2d 788 (1973), judgment vacated U. S. (1974), 42 L. W. 3626. In light of this Court's opinions in *Arnett* and its vacation and remand of *Snead, Sanford* and *Collins*, it is submitted that the issues raised herein still have not "foreclosed the subject" so as to "leave no room for the inference that the question sought to be raised can be the subject of controversy." The very fact that this Court remanded in *Snead, Sanford* and *Collins* rather than affirmed as it did in *Shelton v. Equal Employment Opportunity Commission,* 357 F. Supp. 3 (W. D. Wash. 1973), aff'd U. S. , 42 L. W. 3626 (1974), obviously left open the question of the constitutional validity of the deprivations in those cases for reconsideration, if still necessary, at another time.

A. Petitioner's Claim Has Merit.

With regard to petitioner Pordum's claim, the test is not whether the claim will be successful or not, but whether it is obviously without merit. We submit that Pordum's claims have substantial merit.

Petitioner is a certified licensed school teacher in the State of New York and is tenured. As such, the petitioner has a liberty interest in preserving his teaching certificate (license) as well as his occupational or employment status. [See *Board of Regents v. Roth*, 408 U. S. 564 (1972); *Meyer v. Nebraska*, 262 U. S. 390 (1923)]. He also has a property interest [*Perry v. Sindermann*, 408 U. S. 593 (1972); *Board of Regents v. Roth, supra*], entitled to protection pursuant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The right to engage in any of the common occupations in life, to acquire useful knowledge, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men denotes a liberty protected under law. *Board of Regents v. Roth, supra; Meyer v. Nebraska, supra.* A state may not prevent a person from pursuing any occupation in a manner or for reasons contravening the due process or equal protection provisions of the Fourteenth Amendment to the United States Constitution. *Schware v. Board of Law Examiners of the State of New Mexico*, 353 U. S. 232 (1957). It is well settled that a license essential to the pursuit of a livelihood may not be taken away without the procedural due process required by the Fourteenth Amendment. [See *Bell v. Burson*, 402 U. S. 535, 539 (1971)].

In *Perry v. Sindermann, supra,* at page 601 this Court stated with respect to property:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

It is obvious that petitioner Pordum, as a licensed and tenured school teacher, has such a liberty and property interest in his license and his occupation or right of employment.

It is well settled that even a temporary, non-final deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Bell v. Burson, supra.* The respondents, particularly the Commissioner of Education, have impinged upon these interests by suspending petitioner's license to teach without a prior hearing of any kind, and by preventing the petitioner from engaging in his lawful occupation; and, on the basis of a vague and indefinite statute, by seeking to have petitioner Pordum show cause why his teaching certification should not be cancelled and annulled.[5] The Commissioner of Education has acted pursuant to the Education Law of the State of New York, and more particularly section 305(7) thereof. That aforesaid provision provides in pertinent part that the Commissioner of Education,

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[5]The respondent school district did not formally take any action to suspend Pordum, which in and of itself was a violation of law and due process. Nor did it suspend Pordum pursuant to *Education Law* §3020-a which was in effect at the time of the events complained of herein, an option noted by the District Court and assumed to have been utilized by the Second Circuit.

> "* * * may annul *upon cause shown to his satisfaction* any certificate of qualification granted to a teacher by any authority whatever * * *, and he may consider and reverse his actions in any such matter." [Italics supplied].

Petitioner contends that section 305(7) violates the due process clause of the Fourteenth Amendment to the Constitution in that it is vague and indefinite on its face, and in that it is not made more definite by other statutes, rules or regulations of the Board of Regents and the Commissioner of Education.

In *Grayned v. City of Rockford*, 408 U. S. 104 (1972), the Court noted at page 108:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

In *Arnett v. Kennedy*, U. S. , 42 L. W. 4513 (April 16, 1974), this Court had opportunity to consider the question of statutory vagueness in regard to the standard "for such cause as will promote the efficiency of the service," found in the Lloyd-Lafollette Act, specifically 5 U S. C. §7501 (a). There the Court held in a plurality opinion that the language of a statute does not exist *in vacuo* but may be interpreted and made clear by governmental regulations or opinions of governmental

counsel (42 L. W. at page 4521, concurring opinion at page 4530). In the case at bar, there exist *no* opinions of counsel or regulations adopted to supplement *Education Law* §305 (7). Similarly in *Parker v. Levy*, U. S. , 42 L. W. 4979 (June 19, 1974), this Court has stated that statutory vagueness may be remedied by custom and usage. In the instant case, *Education Law* §305 (7) has never been utilized by the Commissioner (see page 23, *infra*). Therefore *Arnett, supra,* and *Parker v. Levy, supra,* have not foreclosed the vagueness issue; indeed, they reveal that questions of vagueness are still justiciable issues; and pursuant to this Court's mandate in *Goosby v. Osser, supra,* it must be heard by a three-judge court.

Section 305 (7) in effect proscribes the doing of any act and permits penalties to be assessed upon "cause shown to [the Commissioner's] satisfaction * * *." Men of ordinary intelligence must necessarily guess as to the meaning of that phrase and differ as to its application. As such, it fails to give adequate notice of the type of conduct that may result in loss of one's license. Furthermore, the statute does not give the Commissioner of Education adequate standards to be applied in deciding whether to invoke a penalty; and the statute does not provide a standard for judicial review of an administrative procedure. Teachers are constitutionally entitled to both notice of proscribed conduct and a standard for the imposition of penalties.

Additionally, the statute is so vague and overbroad that it unnecessarily infringes upon the basic right to academic freedom of teachers, as well as the right to engage in a common occupation of the community, deemed fundamental in *Board of Regents v. Roth, supra; Meyer v. Nebraska, supra.* As such it is in violation of the due process clause of the Fourteenth Amendment.

That *Education Law* §305 (7) is clearly unconstitutional, being void for vagueness and ambiguity, is to be seen by a comparison with other sections of the *Education Law* of the State of New York regarding the termination of tenured teachers.

Section 2509 of the *Education Law* of the State of New York, subsection 2, which governs respondent school district, provides that regarding probationary teachers recommended for tenure and approved by local boards:

> "Such persons and all others employed in the teaching service of the schools of such school district who have served the full probationary period shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause *after a hearing* as provided by section three thousand twenty-a of such law. *Failure to maintain certification as required by this chapter and the regulations of the commissioner of education shall consitute cause for removal.*" [Italics supplied.]

Thus the statute clearly makes loss of certification only a ground for removal. It does not require, as suggested by the actions of the Commissioner, that revocation of certification constitutes automatic removal.

Section 3012 of the *Education Law*, subsection 2, states in part:

> "Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, *after a hearing* as provided by section three thousand twenty-a of such law:

"(a) insubordination, immoral character or conduct unbecomming a teacher;

"(b) inefficiency, incompetency, physical or mental disability or neglect of duty * * *" [Italics supplied.]

"(c) *failure to maintain certification as required by this chapter and by the regulations of the commissioner of education.*" [Italics supplied.]

Similar standards and hearing procedures are embodied in sections 3013, 3014 and 2573 (subsections 4-8) of the *Education Law* of the State of New York.

Petitioner submits that section 3020-a provided far more procedural and substantive safeguards than *Education Law* §305 (7), yet section 3020-a was still found unconstitutional.[6] If this is so, it is clear that the constitutionality of *Education Law* §305 (7) presents a substantial federal question which has not been foreclosed by prior decisions of the courts.

In *Kinsella v. Board of Education, et al.*, F. Supp. , Appendix "F" herein, decided by a three-judge federal court in the Western District of New York on February 19, 1972, the day before the Second Circuit's decision herein, the court found New York *Education Law* §3020-a unconstitutional on due process grounds. The State of New York chose not to appeal this decision, but enacted remedial regulations, whose validity is being challenged in the state courts.

Education Law §305(7) is entirely devoid *of any* hearing procedure and provides in no way for the preservation of the constitutional rights of the tenured teacher as

[6]Section 3020-a is set forth herein in Appendix "D."

guaranteed by the Fourteenth Amendment. The broad assertion of *Education Law* §305(7) that the Commissioner "* * * may revoke *upon cause shown to his satisfaction* any certificate or qualification granted to a teacher by any authority whatever, or declare any diploma issued by a state teacher's college and state colleges for teachers ineffective and null as a qualification to teach in a common school within this state * * *" [italics supplied] is a grant of an arbitrary and unqualified power. That the Commissioner may also "* * * reconsider and reverse his action in any such matter" is no assurance that the rights of the teacher will be protected in accordance with the due process provisions of the Fourteenth Amendment, and is no limitation on the power of respondent Commissioner of Education.

The absence of procedural due process or any due process from *Education Law* §305 (7) is pointed up by a comparison of it with section 3020-a, even with its constitutional infirmities. Similar comparisons with provisions of the *Education Law* relating to other professions such as doctors, dentists, nurses and accountants further reveal the disparity of procedural and substantive due process accorded teachers. The bare fact that the legislature might have conceived that the professions demanded unequal treatment is no defense to the unconstitutionality alleged herein, for, in making an unequal set of laws, may not the legislature be acting unconstitutionally?

The procedural inadequacy of *Education Law* §305(7) is also made clear by a review of footnote 14 in the opinion of the Court of Appeals (491 F. 2d at p. 1287). Therein the Second Circuit cautioned the Commissioner not to make irrebutable presumptions in judging petitioner Pordum, to consider testimony from respondent

school district. Due to its lack of standards, section 305 (7) is subjective in its application. If the Second Circuit must define the limits of the Commissioner's conduct, the law is indeed vague and ambiguous. At the very least, it presents substantial questions for a court's consideration.

Since this action presents many questions of more than obvious merit, it is clear that at least one-half of the requirement of presenting a substantial federal question has been met.

B. Petitioner's Claim Has Not Been Foreclosed By Previous Decisions of the Court.

The second test to be met in determining if a substantial federal question is present, is to determine whether the case has been foreclosed by previous decisions of the court. The Supreme Court in *Goosby v. Osser, supra,* was confronted with this question and summarized the law as follows:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U. S. 31, 33, (1962), 'wholly insubstantial,' *ibid.*, 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288, (1910), 'obviously without merit' *Ex parte* Poresky, 290 U. S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of unconstitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. §2281. *A claim is insubstantial only if 'its unsoundness so*

> *clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'* " [at page 518]. [Italics supplied.]

The Court of Appeals for the Second Circuit has had occasion to rely on this language with respect to a determination of the issue of foreclosure by prior court decision in *Nieves, et al. v. Oswald, supra.* In *Nieves, supra,* the court emphasized that previous decisions which merely render claims of doubtful or questionable merit *do not* render them insubstantial for the purpose of 28 U. S. C. §2281. It is submitted that in order to foreclose an action under this definition because of a prior decision, both cases would almost have to be identical.

In *Roe v. Ingraham,* 480 F. 2d 102 (2d Cir. 1973), the Second Circuit commented on the very strict limitations imposed on a district court judge in dismissing a complaint seeking an injunction on the ground of unconstitutionality:

> "In the face of recent strong advocacy of the abolition of the three-judge court requirement in constitutional cases, a unanimous Supreme Court has just defined the standard permitting a single judge to dismiss a complaint seeking an injunction on the ground of unconstitutionality in the most limiting terms the court has ever used." [Citing *Goosby v. Osser, supra.*]

Petitioner Pordum herein has alleged that the specific statutes and overall statutory scheme by which the respondents purport to justify their actions are in violation of the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment as well as the First Amendment. The petitioner is not aware of any previous decisions by the Supreme Court regarding

due process of law, freedom of speech and equal protection which "inescapably render" these "claims frivolous" or which "foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." There is and has been currently much litigation in both federal and state courts that would mitigate against such a conclusion. See, e. g., *Burton v. Cascade School District*, 353 F. Supp. 254 (D. C., Ore., 1973); *Roe v. Wade*, 410 U. S. 413 (1973); *Ward v. Village of Monroeville*, 409 U. S. 57 (1972); *Board of Regents v. Roth, supra; Carpenter v. City of Greenfield School District No. 6*, 358 F. Supp. 220, (D. Ct., E. D. Wisc., 1973); *Perry v. Sindermann, supra; Kinsella v. Board of Education of Central School District No. 7*, Case No. 73 CV 1973 (D. Ct., W. D. N.Y.) decided February 19, 1973, and discussed at page 18, *supra; Snead v. Dept. of Social Services, et al., supra.* See also *Arnett v. Kennedy* U. S. , 42 L. W. 4513 (April 16, 1974); *Gieringer v. Center School District #58,et al.*, 477 F. 2d 1164 (8th Cir. 1973), cert. den. U. S. , 42 L. W. 3195 (1973); *Acanfora v. Board of Education*, 491 F. 2d 498 (4th Cir. 1974); *Green v. Waterford Board of Education*, 473 F. 2d 629 (2d Cir. 1973); *Cleveland Board of Education v. LaFleur*, U. S. , 42 L. W. 4186 (1974); *Cohen v. Chesterfield County School Bd.*, U. S. , 42 L. W. 4186 (1974).

It is interesting to note that under New York *Education Law* §§ 2509, 3012, 3013 and 3020-a, a broad definition of the reasons for termination of employment of a tenured teacher is set forth along with specific hearing procedures which must be adhered to. This feature is non-existent in *Education Law* §305(7). An attempt to incorporate sections of the *Education Law* into section 305 (7) to remedy its due process defects must also fail,

since *Education Law* §§2509, 3012, 3013 and 3020-a relate *solely* to powers of boards of education or boards of cooperative educational services, not to the powers of the Commissioner of Education.[7]

Section 305(7) of the *Education Law* has been involved in apparently only three prior decisions of the Commissioner, *Matter of Pryor,* 38 St. Dept. Rep. 115, (1928); *Matter of Hoffman,* 39 St. Dept. Rep. 346 (1930), and *Matter of Quinn,* 67 State Dept. Rep. 7 (1946). *Matter of Quinn* is illustrative of its utilization. Herein formal charges were placed against a teacher by a superintendent of schools. The charges alleged incompetent and inefficient service, neglect of duty, conduct unbecoming a teacher and conduct prejudicial to good order, efficiency and discipline. Specifications were set forth in a bill of particulars thereafter furnished. Hearings were accorded the respondent before a trial committee of the board of education. Section 305(7) was relied upon by the Commissioner to *sustain* the board's action on appeal to him, not to empower the Commissioner to hold a hearing.

These cases illustrate a limited reliance on *Education Law* §305(7) more than twenty-seven years in the past. It is indicative that this section has been rarely, if ever utilized and *never* before by the Commissioner of Education directly. Section 3020-a and other sections of the *Education Law* have supplanted it. In fact, the District Court, in the instant case recognized that section 305(7) has been materially affected by section 3020-a of the *Education Law,* stating at 357 F. Supp. 225:

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[7]Section 305(7) was originally enacted in 1864. It is submitted that Sections 3012, 3013, and 3020(a) which have all been enacted since 1947, and Section 3020(a) as late as 1970, either repeal it by implication, modify it or make it inoperative as a practical matter.

> "Furthermore, in light of the court rulings dealing with tenure of teachers (e. g., *Slochower v. Board of Education,* 350 U. S. 551), state granted licenses (*Bell v. Burson, supra*), and the present statutory scheme providing for hearing procedures and the discharge of tenured teachers (Education Law §2573 [5] [McKinney's Supp., 1972]; Education Law §3020-a (McKinney's 1970) it would seem incongruous to assume that the Commissioner would apply §305 (7) in the *future* without affording a party the various due process protections specifically accorded in this situation." [Italics supplied.]

The Court of Appeals apparently relies on the hearing procedures of section 3020-a to remedy the lack thereof in *Education Law* §305(7). While recognizing that section 3020-a sets forth the statutory duty required of the respondent school district, it assumes compliance with the statutory requirement even in the face of no evidence in the record to support such a conclusion. In fact, the state of the record clearly suggests the contrary, the district indicating that its failure to permit Pordum to return to his teaching duties is based solely on the Commissioner's order to it.

Indeed, it would seem incongruous to assume that respondent Commissioner of Education could apply section 305(7) in any but an arbitrary manner, since hearing and other due process safeguards are *not* incorporated in that provision of the *Education Law*, nor in the rules and regulations of the New York State Education Department, nor in any previous decisions of the Commissioner of Education. While the Commissioner *might* afford petitioner Pordum a hearing, he might decide that another teacher would require no hearing. In addition, the Commissioner, as in the present case, could suspend a teacher prior to any type of hearing. Even assuming

the correctness of the District Court's assumption on the procedural due process issue, this does not overcome the substantive due process problem already described. There is no requirement that a complainant undergo an unconstitutional deprivation of his liberties before the courts will give injunctive or declaratory relief. *Steffel v. Thompson,* U. S. , 42 L. W. 4357 (March 19, 1974).

In regard to the right of a hearing prior to a deprivation of property, the Supreme Court, in *Fuentes v. Shevin,* 407 U. S. 67, 80 (1972) stated:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' *Baldwin v. Hale,* 68 U. S. 223. See *Windsor v. McVeigh,* 93 U. S. 274; *Hovey v. Elliott,* 167 U. S. 409; *Grannis v. Ordean,* 234 U. S. 385. *It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo,* 380 U. S. 545, 552." [Italics supplied.]

With respect to the question of what is a "meaningful time," the Court noted at page 81:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted *at a time when the deprivation can still be prevented.*" [Italics added.]

Accord: *Arnett v. Kennedy, supra.*

It may be argued that even if a party has been arbitrarily deprived of property, there is a remedy in dam-

ages. The Court dismissed this argument stating at page 82:

> "But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This court has not * * * embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois,* 405 U. S. 645."

The court in *Fuentes v. Shevin, supra,* recognized that due process tolerates variances in the *form* of a hearing appropriate to the nature of the case. It also stated at page 82:

> "'* * * the court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation takes effect." [Cited for example by the court are, among other cases, *Bell v. Burson,* 402 U. S. 535, 542; *Wisconsin v. Constantineau,* 400 U. S. 433, 437; *Goldberg v. Kelly,* 397 U. S. 254]." [Italics supplied.]

Accord: *Arnett v. Kennedy, supra.*

In *Boddie v. Connecticut,* 401 U. S. 371, 378-379, the Court noted that the deprivation of property prior to a hearing is only justified in "extraordinary" situations:

> "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before he is deprived of any significant interest,* except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." [Italics supplied.]

In the instant case, it is submitted that there is no valid governmental interest at stake which justifies the deprivation of petitioner Pordum's property and liberty interests (i. e., his occupation and livelihood) prior to a hearing by both the Commissioner and respondent district's board of education. Indeed the respondent City School District of the City of Lackawanna not only has always rated petitioner as a satisfactory teacher, it offered to reinstate and re-employ petitioner.

The length of time petitioner Pordum has been deprived of property and liberty is not relevant to the requirement of a hearing. In *Fuentes v. Shevin, supra,* the Court stated at page 86:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind."

It would be a curious inversion of our constitutional liberties to conclude that the reasoning of *Fuentes v. Shevin, supra,* regarding several pieces of household furniture is not applicable to a citizen's property interests in pursuing a common occupation and livelihood. Indeed, this Court recognized that the value of the deprivation is unimportant when it concluded in *Fuentes v. Shevin, supra,* at page 89:

> "No doubt, there may be many gradations in the 'importance' or the 'necessity' of various consumer goods. Stoves could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions."

The court's ruling in *Mitchell v. Grant,* U. S. , 42 L. W. 4671 (May 13, 1974), does not alter this analysis. In *Mitchell, supra,* before the temporary deprivation of property was permitted by state law, a requisite showing had to be made before a judge, and judicial authorization obtained (42 L. W. at 4676). In the instant case, the temporary deprivation was initiated without even minimal due process or recourse to judicial authority. In *Mitchell* the court, a neutral body, issued authorization for the temporary deprivation; in the present case, the same party seeking revocation of a license to teach is the same party authorizing the temporary deprivation—i. e., the Commissioner of Education of the State of New York. Such a procedure raises the question of inpartiality discussed by Justice White in *Arnett v. Kennedy* and addressed by the court in *Gibson v. Berryhill,* 411 U. S. 564 (1973).

Finally, *Mitchell, supra,* at 42 L. W. 4677, determined that the facts relevant to obtaining authorization for the temporary deprivation (a writ of sequestration) were narrowly confined. In petitioner's case, the power of the Commissioner of Education is broad and unlimited by statute, rule or regulation.

Petitioner Pordum's argument before both the District Court and the Court of Appeals also concerned the question of respondent Commissioner's statutory authority to suspend petitioner from teaching. The Court of Appeals at page 1283 of its decision, at footnote two, stated:

> "Appellant contends that the Commissioner does not have the power to suspend or dismiss a teacher, only to revoke certification. This contention is questionable."

At page 1285 of its opinion, the Court of Appeals added:

> "* * * appellant contended at oral argument that the Commissioner did not have the authority to suspend him and that the school district, in obeying the unauthorized order of the Commissioner not to employ him, breached independent constitutional and statutory duties owing to appellant. This argument is based on the major premise that the Commissioner has the authority only to revoke and annul Pordum's license, not to suspend him from his teaching duties."

The court was in error in rejecting this construction of New York law. In *Matter of Lynch*, 41 App. Div. 2d 363, 343 N. Y. S. 2d 179, 182 (3rd Dept. 1973), affirmed without opinion on the basis of the Appellate Division's decision by the New York Court of Appeals, 34 N. Y. 2d 588, 354 N. Y. S. 2d 948 (1974), the court held:

> "Certification requirements, however, may not be employed to erode the protections afforded tenured teachers, since the tenure statutes provide the exclusive method for dismissal for those teachers (*Matter of Kobylski v. Agone*, 37 Misc. 2d 255, 234 N. Y. S. 2d 907, aff'd 19 A. D. 2d 761, 242 N. Y. S. 2d 630)."

See also, *Boyd v. Collins*, 11 N. Y. 2d 228, 228 N. Y. S. 2d 228 (1962). These cases clearly indicate that New York law authorizes the dismissal of tenured teachers *only* through its tenure statutes and by boards of education. And there is no power granted in the tenure statutes for the Commissioner of Education to directly affect petitioner Pordum's employment.

Under New York law, licensing and employment are separate functions. The former being the sole province of the Commissioner of Education of the State of New

York; the latter being the sole province of the local school district.

The Commissioner of Education recognized this view of his own powers regarding the licensing and employment of teachers in *Matter of Colen Gardner,* Ed. Dept. Rep. , Decision No. 8822 (May 24, 1974) (attached as Exhibit E), wherein at page 4 he stated:

> "* * * as the Appellate Division, Third Judicial Department noted in *Matter of Lynch v. Nyquist,* 41 A. D. 2d 363, aff'd N. Y. 2d , certification requirements cannot be used to erode the tenure laws, *since such statutes provide the exclusive methods for dismissal of teachers* * * * (see *Matter of Lynch v. Nyquist, supra; Matter of Mannix v. Board of Education,* 21 N. Y. 2d 455; *Matter of Glass v. Board of Education,* 21 A. D. 2d 891, aff'd 16 N. Y. 2d 982; *Matter of Feingold,* 31 A. D. 2d 969; *Matter of Kobylski v. Agone,* 37 Misc. 2d 255, aff'd 19 A. D. 2d 761).
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> "While *tenure represents the relationship between a teacher and his employer, certification represents the relationship between the teacher and the Commissioner of Education,* the state officer responsible for certification of teachers outside of the New York City and Buffalo city school districts. No school district can by its acts of omission or commission bind the Commissioner to waive certification requirements." (Italics supplied.)

This clearly shows that the Commissioner recognizes the statutory limitations on his power to directly interfere with the employment relationships between teachers and school districts. Therefore the suspension of petitioner by respondent Commissioner is in violation of New York law. For just as a school district cannot by "its acts of omission or commission bind the Commissioner to waive

certification requirements" neither can the Commissioner by his acts of omission or commission bind a school district with respect to whether it will or will not discharge or keep a teacher whose certification may have been revoked or otherwise terminated. Hence the issue of whether the Commissioner of Education deprived petitioner of property without due process of law presents a substantial federal question. At the least, even if it does not require the convening of a three-judge court, it still presents a cognizable federal issue to be determined by the District Court.

Petitioner Pordum's case should be remanded to the District Court to be reviewed in the light of this Court's decision in *Arnett v. Kennedy, supra.* In *Arnett,* a majority of the court held that a non-probationary governmental employee has, at the least, the right to some procedural due process (although less than a full evidentiary hearing) prior to a suspension without pay. Petitioner Pordum was summarily enjoined from teaching, and thus suspended without pay and given no prior notice of such suspension or of the charges preferred against him, no opportunity to reply prior to such suspension and no notice that a written decision on the answer would be made at any time. In *Arnett,* Justices Powell, Blackmun and White held that some kind of procedure was required prior to suspension without pay. Justices Marshall, Douglas and Brennan held that *any* deprivation must be accompanied by a prior full-scale evidentiary hearing. At the very least a majority court makes clear that at least *some* procedure must *precede* a suspension without pay. This decision makes it clear that the issue of suspension without pay without *any* prior proceeding is a substantial federal question that has *not* been foreclosed by prior decisions of the courts, and therefore is appropriate for consideration by a three-judge

court. *Goosby v. Osser, supra.* See also, *Morrissey v. Brewer,* 408 U. S. 471 (1972). Even the plurality opinion of Justice Rehnquist in *Arnett* does not answer the issues posed here since the statute involved herein does not define or limit the rights guaranteed to Pordum in the manner suggested by that opinion.

In the case at bar, the fact that respondent Commissioner of Education has initiated a prosecutorial course of action to deprive petitioner Pordum of his certification and has simultaneously assumed the role of judge also makes the proposed license revocation proceeding hopelessly prejudiced against petitioner. *Gibson v. Berryhill,* 411 U. S. 564 (1973). Respondent Commissioner of Education has initiated charges against Pordum, has enjoined him from teaching, and requests Pordum to show cause why his teaching certification should not be removed. These actions involving allegations of denial of basic constitutional rights present substantial constitutional issues for judicial determination.

The District Court (357 F. Supp. at 226) and Court of Appeals (491 F. 2d at 1286) state that petitioner's equal protection argument is baseless. Petitioner must respectfully disagree. In the application of the *Education Law* to other professions, the standards of due process which must be adhered to before licenses can be revoked are clear and detailed. Some examples will suffice. In *Education Law* §6509, a section covering definitions of professional misconduct, there are nine subdivisions. Misconduct is defined to include obtaining a license fraudulently, practicing the profession fraudulently beyond the authorized scope of the profession, practicing with gross incompetency or gross negligence and being convicted of committing an act constituting a crime under New York, Federal or other law. Due process considerations are em-

bodied in section 6510 covering proceedings and cases of professional misconduct. This section details prehearing procedures, hearing procedures, decision procedures, and review procedures. Even if instances of professional misconduct are alleged, it is only *after* a complaint has been made, investigated, written charges prepared, a notice of hearing sent out, and a hearing held, that the decision to revoke a license, suspend a licensee, or fire a licensee, can be made. Section 6511 of the *Education Law*, "penalty for misconduct," states:

> "The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct * * * are: (1) reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration and (5) limitation on registration or issuance of any further license. Board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked."

In the instant case, *Education Law* §305(7) mandates no hearing and fails to state any standards of conduct which are expected of teachers. The New York *Education Law*, insofar as it pertains to the misconduct proceedings of other professionals provides multiple examples of due process safeguards. Because *Education Law* §305(7) does not afford teachers the same equal protection of the law as it does to other professions, it is thus unconstitutional, or, in the least, presents a substantial constitutional question requiring the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284.

It is not enough for the lower courts to dismiss petitioner's equal protection argument with the conclusion that by setting different standards for professions the legis-

lature was acting in a rational manner. Petitioner challenges his unequal treatment. It is up to respondents to rebut his allegations. The resolution of these differences presents a substantial constitutional question. See, e. g., *Green v. Waterford Bd. of Ed.*, 473 F. 2d 629 (2d Cir. 1973).

In short, the actions of the District Court and the Court of Appeals in dismissing petitioner's complaint are in direct violation of this Court's mandate in *Goosby v. Osser, supra,* and *Idewild Bon Voyage Liquor Corp. v. Epstein, et al.*, 370 U. S. 713 (1962). Therefore, this Court should grant petitioner's petition for certiorari on this ground.

II.

Even if petitioner's claim did not entitle him to the convening of a three-judge court, his complaint stated a cause of action which could not be summarily dismissed without a hearing on the merits.

Petitioner Pordum, in his complaint, claimed federal jurisdiction under 28 U.S.C. 1343 (3), and 42 U.S.C. 1983. The basis of the complaint was the allegation of violation of appellant's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner further requested that injunctive relief be granted and that a three-judge court be convened.

If a district judge finds the case not one for three-judge review, he may so determine. However, if there is jurisdiction of the plaintiff's claim, he should proceed with the trial of the case in a regular one-judge district court. Cf. *Board of Supervisors of Louisiana State University v.*

Tureaud, 225 F. 2d 434, 435 (5th Cir. 1955). In the instant case, petitioner's motion for injunctive relief was denied. The complaint, however, was dismissed.

The decision of a single judge in refusing to convene a three-judge court is limited to an examination of the pleadings. *Calloway v. Briggs,* 443 F. 2d 296 (6th Cir. 1971). It is submitted that the dismissal in the instant case was in error, for the complaint stated a cause of action and a basis of federal jurisdiction under 28 U.S.C. §1343(3). Petitioner Pordum claimed in paragraph 17 of his complaint that he was deprived of property without due process of law; that *Education Law* §305(7) is vague and indefinite and in violation of the substantive due process requirements of the Fourteenth Amendment to the United States Constitution. Pordum further claimed that he had been denied a further hearing or an opportunity to be heard in violation of the procedural due process guarantees of the Fourteenth Amendment of the United States Constitution (complaint paragraph 18). In addition Pordum claimed that there was a substantial question whether New York *Education Law* §305(7) was not also operating to "chill" the exercise by persons of rights guaranteed them by the First Amendment to the United States Constitution (complaint paragraph 20). The complaint (paragraph 20), further alleged a denial of equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

It is submitted that the District Court and the Court of Appeals have not only determined the validity of the request for a three-judge court, but decided the merits of the complaint. Even on a motion to dismiss, when, as here, no answer has been filed, the complaint must be construed in the light most favorable to the plaintiff.

The District Court, in substance, dismissed Pordum's complaint by granting respondents summary judgment. In *Adickes v. Kress*, 398 U. S. 144, relied on by the District Court, the Supreme Court reversed the district court in regard to the granting of summary judgment denying petitioner's 42 U.S.C. 1983 argument. On page 153 of its decision, the Court noted:

> "In granting respondent's motion [for summary judgment], the district court simply stated that there was no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy' * * * Our own scrutiny of the factual allegations of petitioner's complaint * * * convinces us that summary judgment was improper here, for we think respondent has failed to carry its burden of showing the absence of *any* genuine issue of fact." (Italics supplied.)

In similar fashion, the District Court, in the case at bar, wrongfully dismissed Pordum's complaint by failing "to carry its burden of showing the absence of any genuine issue of fact." The issues presented were clear: due process violations, failure to provide a hearing prior to suspension, lack of statutory specificity and standards, deprivation of liberty and property. The District Court and the Court of Appeals prematurely determined the merits of the complaint since no hearing had been held to develop the factual basis for a decision on the merits.

In *Adickes v. Kress, supra*, the Supreme Court stated on page 150 of its decision:

> "The terms of [42 U.S.C.] §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must

> show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'"

It is submitted the petitioner has shown that respondents' actions have deprived him of both a right of liberty and property guaranteed by the due process clause of the Fourteenth Amendment of the Constitution. It is also submitted that he has been so denied through the actions of State of New York officials acting pursuant to state law, namely New York *Education Law* §305(7). Thus both requirements for a viable issue of fact have been met pursuant to the rule laid down in *Adickes, supra.*

Jurisdiction has been laid in the Federal District Court under 28 U.S.C. §1343(3). As alleged in the case at bar for jurisdiction pursuant to 42 U.S.C. §1983, similar deprivations of constitutional rights are reasserted as violations redressable under 28 U.S.C. §1343(3).

The above allegations in Pordum's complaint, based on the jurisdictional predicate claimed under 28 U.S.C. §1343(3), provided adequate federal questions for review by the District Court. The aforementioned court, however, by dismissing appellant Pordum's request for injunctive relief and a three-judge court, never considered petitioner Pordum's complaint on its merits and prematurely dismissed it.

Conclusion.

For the foregoing reasons petitioner respectfully urges that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Second

Circuit, reverse the judgment of that court and remand for further proceedings in accordance with this court's decisions in *Goosby v. Osser,* 409 U. S. 512 (1973), and *Arnett v. Kennedy,* U. S. , 42 L. W. 4513 (April 16, 1974).

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Respectfully submitted,

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